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Supreme Court, U.S.
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No. 96-1366

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re

JUDY MADSEN JOHNSON, ED MARTIN, SHIRLEY HOBBS and RESCUE AMERICA,

Petitioners.

On Petition for Writ of Mandamus to the Eighteenth Judicial Circuit Court of Florida

REPLY BRIEF OF PETITIONERS TO PETITION FOR WRIT OF MANDAMUS

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Judy Madsen Johnson, Ed Martin, Shirley Hobbs and Rescue America respectfully petition for a writ of mandamus to compel the Eighteenth Judicial Circuit Court of Florida to comply with this Court's Mandate in *Madsen v. Women's Health Center, Inc*, 114 S. Ct 2516 (1994).

I.

THE RECORD BEFORE THIS COURT IS THE IDENTICAL RECORD WHICH WAS BEFORE THE TRIAL COURT, AND THEREFORE THE TRIAL COURT EXCEEDED ITS AUTHORITY BY ADDING RESTRICTIONS TO THE INJUNCTION WITHOUT HEARING ANY NEW EVIDENCE TO JUSTIFY THE RESTRICTIONS.

The entire record in this case is contained in the Joint Appendix, a 626 page document which was filed with this Court. **All** of the testimony which was transcribed from the hearings in 1993 is contained in the Joint Appendix.

Nevertheless, Respondents state in their brief that this Court had an incomplete record before it when it rendered its decision in *Madsen*. Brief of Respondents Women's Health Center, Inc., Aware Woman Center for Choice, Inc., EPOC Clinic, Inc., and Central Women's Health Organization, Inc., in opposition to Petition for Writ of Mandamus (hereinafter "Brief") at 2 - 3, 10. Based on this inaccurate premise, Respondents argue that the new, substantive restrictions added to the Modified Amended Permanent Injunction are justified since they "are a product of a much more detailed record than this Court has yet seen." Brief at 3.

There is **no** record evidence in this case which is not contained in the Joint Appendix.[1] There has been no further

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[1] Judge McGregor issued the Amended Permanent Injunction at issue in *Madsen*. He has since retired. Judge Brock was assigned to this case following this Court's remand. No new evidence has been presented in this case. All Judge Brock had to rely on was the evidence in the Joint

evidence introduced in this case since 1993. Accordingly, when the trial court created the new restrictions in 1996, it did so without the benefit of any new evidence. This Court clearly ordered the Florida courts to strike the unconstitutional provisions from the injunction. The trial court failed to follow this Court's clear mandate to strike the unconstitutional provisions but instead chose to invent new, highly specific, substantive restrictions upon Petitioners' Free Speech rights, without any new evidence to support the new restrictions. Respondents' attempt to refute this fact by claiming the trial court had a fuller record than this Court is without foundation.

Respondents argue that "this case involves the application of a standard that requires the trial judge to exercise a significant amount of discretion." Brief at 5. The only issue addressed in the Petition for Writ of Mandamus is that this Court unequivocally struck down provisions in the injunction and mandated the trial court to hold proceedings consistent with that opinion. Petition at 4. To comply with this Court's Mandate requires no discretion at all. Compliance with this Court's Mandate would have been achieved by simply striking the unconstitutional provisions from the injunction.

Respondents state that the tailoring of an injunction entails a trial judge's exercise of discretion after the judge "holds evidentiary hearings and thus becomes intimately familiar with the facts of a particular case." Brief at 6. The essence of this Petition for Writ of Mandamus is that no such evidentiary hearings were held to justify the trial court's "exercise of discretion" to create new, substantive restrictions in the injunction. According to the Respondents' own standard the Modified Amended Permanent Injunction cannot stand. No evidence was presented nor requested. In fact, Petitioners

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Appendix, which is exactly the same evidence before this Court.

have not been anywhere near the Clinic for several years.

Respondents set up a false dichotomy by stating that this Court's Mandate left the trial court with only two options: (1) support the provisions with specific evidence "introduced in its three-day evidentiary hearing but not included in the record" to this Court; or (2) narrow the injunction provisions. Brief at 11. As stated above, Judge Brock had no evidence to review which was not contained in the Joint Appendix before this Court and he took no subsequent evidence before creating the new restrictions in the Modified Injunction. Narrowing the injunction provisions was certainly an option for the trial court, so long as the trial court obtained evidence to support the new, narrower provisions. The scenario offered by the Respondents omits the obvious response to this Court's Mandate: to strike the unconstitutional provisions. If further restrictions were necessary, the trial court could hold hearings on that issue. Instead, the trial court skipped the essential step of obtaining evidence prior to restricting Petitioners' Free Speech rights and simply added the restrictions. The trial court never cites to any evidence to support these new restrictions.

II.

A WRIT OF MANDAMUS IS NECESSARY AND PROPER IN THIS CASE BECAUSE ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM FROM ANY OTHER COURT.

Mandamus lies to **rectify a deviation by the trial court from the letter and spirit of the reviewing court's mandate**, and the mandamus approach may appropriately be utilized to correct a misconception of scope and effect of the reviewing

court's decision, or to prevent relitigation of issues already decided by the reviewing court. *Yablonski v. United Mine Workers of America*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), cert. denied 406 U.S. 906. The trial court in this case has deviated from both the letter and the spirit of this Court's clear mandate to strike the unconstitutional provisions from the injunction. Mandamus is appropriately utilized to remedy these kinds of deviations, to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

Mandamus is also appropriately utilized to prevent relitigation of issues already decided by the reviewing court. The flaws with the 36-foot buffer zone around the clinic, the "images observable" provision, the 300-foot buffer zone around the residences, and the 300-foot no-approach zone around the clinic were fully litigated in the Eighteenth Judicial Circuit Court in and for Seminole County, Florida; the Florida Supreme Court; and this Court. Respondents claim Petitioners should be denied relief through a mandamus and instead simply relitigate these issues again.

This Court is familiar with the issues in this case and could easily bring this matter to a conclusion by issuing a mandamus ordering the trial court to strike the unconstitutional provisions of the injunction and prohibit the creation of new, substantive restrictions unless the court receives additional evidence supporting the new restrictions. For reasons of judicial economy, mandamus is a clean, simple remedy to rectify the trial court's deviation from the letter and spirit of this Court's mandate.

Respondents claim that Petitioners' appeal of the Modified Amended Permanent Injunction should forestall relief from

this Court. Yet this Court is fully within its rights to issue a writ of mandamus to effectuate or prevent frustration of its previous order. *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1032 (D.C. Cir. 1983); *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). However, mandamus is within this Court's discretionary powers. If this Court were to deny Petitioners' Petition for Writ of Mandamus, Petitioners must be prepared to pursue all avenues of relief to protect their interests.

Respondents mischaracterize Petitioners' argument as a claim that the trial court applied the *Madsen* standard incorrectly, an error which could be corrected via appeal. Petitioners argument is not that the trial court misapplied the *Madsen* standard, but rather that the trial court simply failed to follow this Court's clear Mandate to strike the unconstitutional provisions of the injunctions. It is this frustration by the trial court of this Court's order which prompted the Petition for Writ of Mandamus.

CONCLUSION

In light of the reasons stated above, the Petitioners respectfully request this Court to issue a Writ of Mandamus to the Eighteenth Judicial Circuit Court of Florida.

Respectfully Submitted,

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